



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ron Nehring
Chairman
California Republican Party
1201 K Street
Suite 740
Sacramento, CA 95814

JAN 21 2010

RE: MUR 6127
President Barack Obama
Obama for America
Obama Victory Fund
Saul Ewing LLP
VIDA Fitness

Dear Mr. Nehring:

This is in reference to the complaint you filed with the Federal Election Commission on November 4, 2008. The Commission found that there was reason to believe that VIDA Fitness and David von Storch violated 2 U.S.C. § 441b(a), a provision of the Federal Election Campaign Act of 1971, as amended, and 11 C.F.R. § 114.2(f). On January 14, 2010, a conciliation agreement signed by the respondents was accepted by the Commission. In addition, the Commission: (1) dismissed the allegation that President Barack Obama, Obama for America and Martin Nesbitt, in his official capacity as Treasurer ("Obama for America"), violated 2 U.S.C. § 439a(b) and sent cautionary letters; (2) dismissed the allegation that the Obama Victory Fund and Andrew Tobias in his official capacity as Treasurer ("Obama Victory Fund"), Obama for America, and the Democratic National Committee and Andrew Tobias as Treasurer ("DNC") violated 2 U.S.C. § 441b(a); (3) found no reason to believe that Obama for America violated 2 U.S.C. §§ 434(b) and 441a(f) and 11 C.F.R. § 104.3; and (4) found no reason to believe that Saul Ewing, LLP violated 2 U.S.C. § 441a(a). Accordingly, the Commission closed the file in this matter on January 14, 2010.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the conciliation agreement with VIDA Fitness and David von Storch is enclosed for your information. In addition, the Factual and Legal

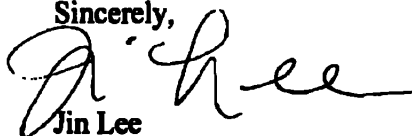
10044261421

Mr. Ron Nehring
MUR 6127
Page 2 of 2

Analyses, which more fully explain the Commission's findings with respect to the other respondents, are enclosed.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Jin Lee", written in a cursive style.

Jin Lee
Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analyses

10044261422

BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
FEDERAL ELECTION
COMMISSION

2009 DEC 23 AM 9: 39

OFFICE OF GENERAL
COUNSEL

In the Matter of

)
)
)
)
)

MUR 6127

VIDA Fitness

Urban Salons, Inc. d/b/a Bang Salon Spa

David von Storch

CONCILIATION AGREEMENT

This matter was generated by a complaint filed with the Federal Election Commission ("Commission"). See 2 U.S.C. § 437g(a)(1). The Commission found reason to believe that VIDA Fitness, Urban Salons, Inc., d/b/a Bang Salon Spa, and David von Storch (collectively "Respondents") violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f), provisions of the Federal Election Campaign Act, as amended (the "Act").

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

Applicable Law

1. Corporations are prohibited from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2

U.S.C. § 441b(a).

2. Corporations (including officers, directors or other representatives acting as agents for the corporation) also are prohibited from facilitating the making of contributions. 11

C.F.R. § 114.2(f)(1).

3. Corporate facilitation includes "using a corporate or labor organization list of customers, clients, vendors or others who are not in the restricted class to solicit contributions or distribute invitations to the fundraiser, unless the corporation or labor organization receives advance payment for the fair market value of the list." 11 C.F.R. § 114.2(f)(2)(i)(D).

4. Corporate facilitation includes "providing catering or other food services operated or obtained by the corporation or labor organization, unless the corporation or labor organization receives advance payment for the fair market value of the services." 11 C.F.R. § 114.2(f)(2)(i)(E).

5. Corporations are permitted to solicit contributions to be sent directly to candidates, but those solicitations are limited solely to its stockholders and executive or administrative personnel, and their families, which constitute a corporation's restricted class. See 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f).

Factual Background

6. VIDA Fitness ("VIDA"), a Subchapter S corporation, is a fitness club with three locations in Washington, D.C.

10044261424

7. Urban Salons, Inc., d/b/a Bang Salon Spa ("Bang") is a salon and spa with three locations in Washington, D.C.

8. David von Storch is VIDA's President and sole shareholder and is Bang's Chief Executive Officer and Principal Owner.

9. Obama Victory Fund ("OVF") is the joint fundraising committee comprised of Obama for America, which is the principal campaign committee for President Barack Obama, and the Democratic National Committee.

10. In or about mid-September 2008, Mr. von Storch and Thomas Petrillo, a representative of OVF, agreed to hold a fundraising event on September 26, 2008 ("OVF Event") at VIDA's newest location on 1515 15th Street, N.W., Washington, D.C. This location had not yet opened to the public.

11. Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the OVF Event that was prepared by OVF.

12. Without the knowledge or approval of OVF, including Mr. Petrillo or any agents thereof, Mr. von Storch revised the invitation and, on September 19, 2008, electronically sent the invitation to approximately 20,000 individuals on a list of customers and friends of VIDA and Bang ("VIDA/Bang List") that was prepared by Mr. von Storch.

13. Neither VIDA nor Bang received any payment for the use of the VIDA/Bang List from OVF prior to September 19, 2008. Mr. von Storch estimated the value of the VIDA/Bang List at \$3,000.

14. On September 26, 2008, OVF held the OVF Event at VIDA's location on 15th Street in Washington, D.C., described in paragraph 10.

15. Although VIDA provided beverages, including a keg of beer and sodas, which were approximately worth \$225, VIDA failed to invoice OVF for these beverages until November 26, 2008, and OVF paid the invoice on December 4, 2008.

16. On December 4, 2008, Mr. von Storch made a personal contribution of \$3,000 to OVF, the estimated value of the VIDA/Bang List.

V. Respondents committed the following violations of the Act:

1. Respondents facilitated the making of contributions in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by failing to obtain advance payment for the VIDA/Bang List to distribute an invitation to the OVF Event and by failing to obtain advance payment for the beverages provided by VIDA at the OVF Event.

2. Respondents solicited contributions from individuals outside of VIDA's and Bang's restricted class in violation of 2 U.S.C. § 441b(b).

VI. Respondents will pay a civil penalty to the Federal Election Commission in the amount of five thousand and five hundred dollars (\$5,500), pursuant to 2 U.S.C. § 437g(a)(5)(B).

VII. Respondents will cease and desist from violating 2 U.S.C. § 441b and 11 C.F.R. § 114.2(f).

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof

10044261426

MUR 6127

VIDA Fitness, Urban Salon, Inc., d/b/a Bang Salon Spa,

and David von Storch

Conciliation Agreement

Page 5 of 5

has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

X. Respondents shall have no more than thirty days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement.

XI. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

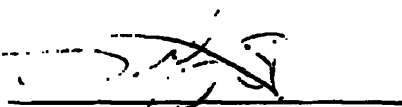
Thomasenia P. Duncan, General Counsel

BY:


Ann Marie Terzaken
Associate General Counsel

1/20/10
Date

FOR THE RESPONDENTS:


VIDA Fitness

12-1-09
Date


Urban Salons, Inc., d/b/a
Bang Salon Spa

12-1-09
Date


David von Storch

12-1-09
Date

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: VIDA Fitness
David von Storch**

MUR: 6127

I. INTRODUCTION

The Complaint in this matter alleges that VIDA Fitness ("VIDA"), a health club based in Washington, D.C., violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b), (d) and (f) by facilitating the making of contributions and making prohibited contributions to the Obama Victory Fund ("OVF"), a joint fundraising committee comprised of OFA and the Democratic National Committee ("DNC"). The Complaint claims that VIDA facilitated the making of contributions by using a corporate email list to distribute OVF fundraising solicitations and allowing OVF to use VIDA's facilities for a fundraiser. Because VIDA allegedly never charged OVF for the use of the email list or the use of the space, the Complaint argues that VIDA made, and OVF knowingly accepted, prohibited corporate contributions. Based on the discussion below, the Commission finds reason to believe that VIDA and David von Storch violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by facilitating the making of a contribution.

II. FACTUAL BACKGROUND

VIDA, a Subchapter S corporation, is a fitness club with three locations in Washington, D.C.¹ Response of VIDA Fitness ("VIDA Response"), Declaration of David von Storch ("von Storch Dec.") at ¶ 1. David von Storch is VIDA's sole shareholder and has been an active member of the Democratic Party. von Storch Dec. at ¶¶ 1-2. According to the VIDA Response, in mid-September 2008, Mr. von Storch and Tom Petrillo, a fundraiser for the DNC, spoke about holding a fundraising event on September 26, 2008 to benefit OVF. *Id.* at ¶ 3. Mr. von Storch

¹ See VIDA Fitness website, www.vidafitness.com.

1 told Mr. Petrillo about empty space at VIDA's newest location, and they agreed to hold the event
2 at this location. *Id.* The VIDA Response and the Response of DNC and OVF ("DNC/OVF
3 Response") indicate that Mr. Petrillo informed Mr. von Storch that OVF would have to be
4 invoiced for the rental of the space as well as any food or beverages served at the event. *Id.*;
5 DNC/OVF Response, Declaration of Thomas Petrillo ("Petrillo Dec.") at ¶ 4.

6 Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the
7 fundraiser. See OVF Invitation, attached as Exhibit A to DNC/OVF Response; von Storch Dec.
8 at ¶ 7. Mr. Petrillo also emailed this invitation to approximately 500 donors in the D.C.
9 metropolitan area. Petrillo Dec. at ¶ 5. According to Mr. von Storch, he revised the invitation,
10 without Mr. Petrillo's knowledge or approval, adding a special disclaimer stating, "VIDA and
11 Bang² do not endorse nor support any political candidate, but do encourage their members and
12 friends to get involved and participate in the electoral process." See VIDA Invitation, attached
13 as Exhibit B of VIDA Response; von Storch Dec. at ¶ 7. On his own accord and without the
14 knowledge or approval of Mr. Petrillo, Mr. von Storch then emailed this invitation to
15 approximately 20,000 individuals who were on a list, prepared by Mr. von Storch, of customers
16 and friends of VIDA and Bang. von Storch Dec. at ¶¶ 9, 10; Petrillo Dec. at ¶¶ 7-8. Mr. von
17 Storch states that he subsequently paid Vida \$3,000 as a "personal in-kind contribution" to the
18 OVF for the use and rental of the email list, calculated as "\$150[0].00 [sic] per 10,000 names."
19 von Storch Dec. at ¶ 10. The Commission's disclosure database indicates that Mr. von Storch
20 made a \$3,000 contribution to OVF on December 4, 2008.³

² Bang refers to Bang Salon and Spa, which is a salon owned by Mr. von Storch.

³ Although the contribution limit for individuals to a candidate committee during the 2008 election cycle was \$2,300, individuals could give a maximum contribution of \$28,300 to national party committees. See 2 U.S.C. § 441a(a). Because OVF was a joint fundraising committee in which OVF and the DNC were participants, an individual could make a contribution up to \$30,300. See 11 C.F.R. § 102.17(c)(5) (providing that a contributor

1 On September 26, the day of the fundraiser, OVF brought in, at its own expense, the
2 equipment and volunteers to manage the event and guests, von Storch Dec. at ¶ 11, but it had not
3 received an invoice from VIDA for the use of the space and beverages. According to press
4 reports, more than 400 attended this event and tickets were "almost sold out" at \$250 to \$2,500.⁴
5 In addition, there were a limited number of tickets available at \$100. See VIDA Invitation.
6 Given that the gym was to open on the following Monday, von Storch reportedly promoted this
7 event a "sneak peak" into the new location.⁵ At this time, we do not have information as to how
8 much was raised or how much of the amount raised resulted from Mr. von Storch's invitations.

9 After the event, Mr. Petrillo claims that he asked Mr. von Storch for an invoice but did
10 not receive one immediately. Petrillo Dec. at ¶ 9. According to Mr. von Storch, because the
11 main celebrity attraction cancelled her appearance at the last minute, "[f]rustration and confusion
12 reigned, and invoicing for the rental space and beverages got lost in the shuffle." von Storch
13 Dec. at ¶ 11. Furthermore, Mr. von Storch became occupied with the grand opening of the new
14 VIDA location and did not realize that he forgot to submit the invoice to Mr. Petrillo. von Storch
15 Dec. at ¶ 12. Mr. Petrillo also was deployed to Ohio to conduct campaign work and did not
16 realize that he had not yet received an invoice. Petrillo Dec. at ¶ 12. When Mr. Petrillo learned
17 of the Complaint in this matter, he again asked Mr. von Storch for the invoice. Petrillo Dec. at ¶
18 11.

could make a contribution to the joint fundraising effort in an amount that represents the total of the allowable contribution limits for all participants).

⁴ Ann Schroeder Mullins, *Sarah Jessica Parker in Town Tonight for Obama*, POLITICO, Sept. 26, 2008, http://www.politico.com/blog/annschroeder/0908/Sarah_Jessica_in_town_tonight . . .

⁵ *Id.*; see also, Victor Maldonado, *Sarah Jessica Parker to Headline Obama Fundraiser in Washington*, Sept. 22, 2008, <http://www.nashnewsline.com/showDiary.do?diaryId=7130&view=print> (stating that the event would also celebrate the opening of VIDA's Metropole location).

1 On December 4, 2008, Mr. Petrillo received an invoice, dated November 26, 2008, from
2 Mr. von Storch for \$2,725.00. Petrillo Dec. at ¶ 12; VIDA invoice, attached as Exhibit C to
3 VIDA Response. Mr. von Storch stated that he charged \$2,500 for the space rental based upon
4 what he estimated a hotel would charge for the same amount of space used, given that the space
5 was new, and "there was no history of customary use, or usual and normal rental charge for, the
6 venue." VIDA Response at 4. In addition, Mr. von Storch charged \$225 for beverages that were
7 served at the event. von Storch Dec. at ¶ 12. OVF subsequently paid the invoice. See Check
8 No. 5560, attached as Exhibit D to VIDA Response.

9 In a supplemental Response, Mr. von Storch explained that since there was no customary
10 usage established for the new location of VIDA and he had no experience estimating the fair
11 market value of renting the space, "he estimated an amount that he thought would be a
12 reasonable fair market value" April 6, 2009 Letter from Katherine R. Boyce Esq. He then
13 discussed the price with the event organizer of the DNC and "was told that, based on the DNC's
14 extensive experience with costs of hotel venue rentals with beverages included (only sodas and
15 beer from one keg were served), the price quoted in the invoice seemed reasonable." *Id.*

16 **III. LEGAL ANALYSIS**

17
18 A corporation is prohibited from making a contribution in connection with a federal
19 election under the Act. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). In addition, neither a
20 federal candidate nor a political committee may knowingly accept a contribution from a
21 corporation. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d). The Commission's regulations
22 further provide that a corporation may not facilitate the making of a contribution by using its
23 corporate resources to engage in fundraising activities for any federal election. See 11 C.F.R.
24 § 114.2(f)(1). The regulations provide examples of conduct that constitute corporate facilitation,

1 including the use of a corporate customer list, to send invitations to individuals not within the
2 restricted class to fundraisers without advance payment; the use of meeting rooms that are not
3 customarily available to civic or community organizations; and the provision of catering or other
4 food services without advance payment. See 11 C.F.R. § 114.2(f)(2).

5 *a. Use of VIDA's Customer List*

6 Corporations such as VIDA, which do not have separate segregated funds, are permitted
7 to solicit contributions to be sent directly to candidates, but those solicitations are limited solely
8 to its restricted class, consisting of its stockholders and executive or administrative personnel,
9 and their families. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f). Moreover,
10 corporate facilitation may result if the corporation uses its list of customers, who are not within
11 the restricted class, to solicit contributions or distribute invitations to fundraisers without
12 advance payment for the fair market value of the list. See 11 C.F.R. § 114.2(f)(2)(i)(C).

13 Thus, when Mr. von Storch, the President of VIDA, emailed a list of 20,000 VIDA
14 customers and friends to distribute the September 26 fundraiser invitation without making an
15 advance payment, VIDA solicited outside of its restricted class and facilitated the making of
16 contributions to OVF. While Mr. von Storch reimbursed VIDA after the complaint was filed,
17 such reimbursement may mitigate but not vitiate a violation. Accordingly, the Commission finds
18 reason to believe that VIDA violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f).

19 *b. Space Rental*

20 Corporate facilitation includes "using meeting rooms that are not customarily available to
21 clubs, civic or community organizations or other groups." 11 C.F.R. § 114.2(f)(2)(i)(D). For
22 example, facilitation would occur if a corporation makes its meeting room available for a
23 candidate's fundraiser, but not for community or civic groups. See *Explanation and*

10044261432

1 *Justification, Facilitating the Making of Contributions*, 60 Fed. Reg. 64259, 64264 (Dec. 14,
2 1995). The permissibility of using such rooms when a corporation receives payment is governed
3 by 11 C.F.R. § 114.9(a), (b), or (d). *Id.* Section 114.9(d), which pertains to "use or rental" of
4 corporate facilities, provides that persons may make use of corporate facilities in connection with
5 a federal election so long as they reimburse the corporation "within a commercially reasonable
6 time in the amount of the normal and usual rental charge." *Id.*

7 In this matter, despite the purported agreement between Mr. von Storch and Mr. Petrillo,
8 VIDA failed to provide an invoice to the DNC until after the filing of the Complaint and 61 days
9 after the fundraising event. In a recent matter, MUR 5998 (John McCain for President), the
10 Commission determined that it was commercially reasonable for a vendor to invoice a committee
11 45 days after a campaign event and 6 days after the complaint had been filed, given that the
12 delay was relatively short and was due to a tax concern that was under review by the vendor.
13 Furthermore, the Commission has determined billing a committee approximately 90 days from
14 the event is commercially reasonable. See, e.g., MUR 6034 (Worth & Company, Inc.). While
15 the reason for the delay in this matter appears to have been an oversight by the parties, it appears
16 that VIDA obtained payment for the space within a commercially reasonable time, given that
17 VIDA billed OVF within 61 days of the event and received payment shortly thereafter.

18 With respect to the amount paid for the space rental, VIDA indicates that because the
19 space was brand new with no history of customary use, Mr. von Storch charged \$2,500 based
20 upon what he thought would be a reasonable fair market value of the space rental, although he
21 had no experience estimating what a fair market value would be. See von Storch Dec. at ¶ 12.
22 Mr. von Storch then consulted Mr. Petrillo, who agreed that the price was reasonable. *Id.* While
23 the respondents claim that the price for the space rental was reasonable, respondents have not

10044261433

1 provided any supporting information as to how they determined that the price charged was
2 commensurate with what a hotel would typically charge. *See id.*; April 6, 2009 Letter. For
3 example, they do not state whether they actually compared prices of specific hotels in the area,
4 only that Mr. von Storch, in consultation with the DNC, charged what he "thought" would be a
5 fair market value. Although we do not have any specific information as to whether \$2,500 for
6 the space rental was reasonable and are solely relying on respondent's representations, the
7 Commission should not use its limited resources to further pursue this allegation, given that no
8 information has been presented indicating that the \$2,500 was not the "normal and usual rental
9 charge" for the space under 11 C.F.R. § 114.9(d).

10 *c. Beverages*

11 Under 11 C.F.R. § 114.2(f)(2)(i)(B), corporate facilitation includes "providing catering or
12 other food services operated or obtained by the corporation or labor organization, unless the
13 corporation or labor organization receives advance payment for the fair market value of the
14 services." Because VIDA did not receive advance payment for the beverages, VIDA appears to
15 have facilitated the making of a contribution. Accordingly, the Commission finds reason to
16 believe that VIDA Fitness and David von Storch violated 2 U.S.C. § 441b(a) and 11 C.F.R.
17 § 114.2(f)(2) by facilitating the making of contribution based on VIDA's failure to obtain
18 advance payment for the beverages.

19 **IV. CONCLUSION**

20 Based upon the foregoing information, the Commission finds reason to believe that
21
22 VIDA Fitness and David von Storch violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f).

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Saul Ewing LLP

MUR: 6127

I. INTRODUCTION

The Complaint in this matter alleges that Saul Ewing LLP ("Saul Ewing") intended to make, an excessive contribution in the form of pro bono legal services provided by Saul Ewing lawyers to Obama for America, the principal campaign committee of President Barack Obama, during the 2008 election in violation of 2 U.S.C. § 441a. Based on the discussion below, the Commission finds no reason to believe that Saul Ewing made an excessive contribution in violation of 2 U.S.C. § 441a.

II. FACTUAL BACKGROUND

Saul Ewing is a law firm organized as a Delaware limited liability partnership.¹ It has offices throughout the Mid-Atlantic region of the United States. On October 28, 2008, an article published in the *New York Times* reported that thousands of lawyers were assisting President Barack Obama's campaign by monitoring the polls on Election Day.² The article described how Saul Ewing allowed attorneys employed by the firm to receive pro bono credit for voter protection work and quoted a Saul Ewing partner, Orlan Johnson, who stated, "Our lawyers are willing to go mano-a-mano."³ The article then identified Mr. Johnson as "a member of the Obama national finance committee," and in the immediately following sentence, stated, "All

¹ See Saul Ewing Website, http://www.saul.com/about_us/aboutus.aspx.

² See Leslie Wayne, *Party Lawyers Ready to Keep an Eye on the Polls*, NEW YORK TIMES, Oct. 28, 2008.

³ *Id.*

1 volunteers must undergo a training session either in person or online with the Obama
2 campaign.”⁴

3 **III. LEGAL ANALYSIS**

4 During the 2008 general election, no person could make a contribution, which exceeded
5 \$2,300, to any federal candidate and his authorized committee. 2 U.S.C. § 441(a)(1)(A); 11
6 C.F.R. § 110.1(b). 2 U.S.C. § 431(11) defines “person” to include a partnership. *Id.* Under
7 Commission regulations, a contribution by a partnership must be attributed to the partnership and
8 to each partner either in direct proportion to his or her share of the partnership profits or by
9 agreement of the partners. 11 C.F.R. § 110.1(e)(1), (2). Because Saul Ewing is a partnership, it
10 was subject to the Act’s contribution limits.

11 Citing the October 28, 2008 *New York Times* article, the Complaint alleges that OFA
12 intended to knowingly accept, and Saul Ewing, LLP intended to make, excessive contributions
13 through pro bono legal services rendered by Saul Ewing to OFA in violation of 2 U.S.C. § 441a.
14 Barring some exceptions, the provision of free legal services to a political committee becomes a
15 contribution under 2 U.S.C. § 431(8)(A)(ii), which states that a contribution includes, “the
16 payment by any person of compensation for the personal services of another person which are
17 rendered to a political committee without charge for any purpose.” *Id.*; *see also* 11 C.F.R.
18 § 100.54; AO 2006-22 (Jenkins & Gilchrist) (law firm’s preparation of amicus brief on behalf of
19 political committee free of charge would constitute a contribution). Thus, if Saul Ewing did
20 provide pro bono legal services to OFA, it would have made a contribution to OFA.

21 OFA and Saul Ewing both contend, however, that Saul Ewing never provided pro bono
22 services to OFA. *See* OFA Response at 2-3; Saul Ewing Response at 2. OFA states that it has
23 no knowledge of Saul Ewing providing any pro bono legal services to OFA. OFA Response at

⁴ *Id.*

1 2-3. In addition, Saul Ewing indicates that the article did not accurately report the voter
2 protection activities of its lawyers. *Id.* Although some of its attorneys participated in such
3 activities for pro bono credit, the attorneys participated in a nonpartisan voter protection effort
4 led by the Lawyers' Committee for Civil Rights Under Law, not the Obama campaign. Saul
5 Ewing Response at 2. According to Saul Ewing, while the *New York Times* reporter did speak
6 with Mr. Johnson, Mr. Johnson believed that her questions concerned his personal role in the
7 Obama campaign and not the law firm. *See id.* at 2. Given the specific information provided by
8 OFA and Saul Ewing, the Responses adequately rebut the allegations contained in the
9 Complaint.

10 **IV. CONCLUSION**

11 Based upon the foregoing information, the Commission finds no reason to believe that
12 Saul Ewing violated of 2 U.S.C. § 441a(a).

13

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Obama Victory Fund
Democratic National Committee**

MUR: 6127

I. INTRODUCTION

The Complaint in this matter alleges that VIDA Fitness ("VIDA"), a health club based in Washington, D.C., violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b), (d) and (f) by facilitating the making of contributions and making prohibited contributions to the Obama Victory Fund ("OVF"), a joint fundraising committee comprised of Obama For America ("OFA") and the Democratic National Committee ("DNC"). The Complaint claims that VIDA facilitated the making of contributions by using a corporate email list to distribute OVF fundraising solicitations and allowing OVF to use VIDA's facilities for a fundraiser. Because VIDA allegedly never charged OVF for the use of the email list or the use of the space, the Complaint argues that VIDA made, and OVF knowingly accepted, prohibited corporate contributions. Based on the discussion below, the Commission dismisses the allegation that OVF and the DNC violated 2 U.S.C. § 441b(a) by knowingly accepting a prohibited contribution.

II. FACTUAL BACKGROUND

VIDA, a Subchapter S corporation, is a fitness club with three locations in Washington, D.C.¹ Response of VIDA Fitness ("VIDA Response"), Declaration of David von Storch ("von Storch Dec.") at ¶ 1. David von Storch is VIDA's sole shareholder and has been an active member of the Democratic Party. von Storch Dec. at ¶¶ 1-2. According to the VIDA Response, in mid-September 2008, Mr. von Storch and Tom Petrillo, a fundraiser for the DNC, spoke about

¹ See VIDA Fitness website, www.vidafitness.com.

1 holding a fundraising event on September 26, 2008 to benefit OVF. *Id.* at ¶ 3. Mr. von Storch
2 told Mr. Petrillo about empty space at VIDA's newest location, and they agreed to hold the event
3 at this location. *Id.* The VIDA Response and the Response of DNC and OVF ("DNC/OVF
4 Response") indicate that Mr. Petrillo informed Mr. von Storch that OVF would have to be
5 invoiced for the rental of the space as well as any food or beverages served at the event. *Id.*;
6 DNC/OVF Response, Declaration of Thomas Petrillo ("Petrillo Dec.") at ¶ 4.

7 Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the
8 fundraiser. See OVF Invitation, attached as Exhibit A to DNC/OVF Response; von Storch Dec.
9 at ¶ 7. Mr. Petrillo also emailed this invitation to approximately 500 donors in the D.C.
10 metropolitan area. Petrillo Dec. at ¶ 5. According to Mr. von Storch, he revised the invitation,
11 without Mr. Petrillo's knowledge or approval, adding a special disclaimer stating, "VIDA and
12 Bang² do not endorse nor support any political candidate, but do encourage their members and
13 friends to get involved and participate in the electoral process." See VIDA Invitation, attached
14 as Exhibit B of VIDA Response; von Storch Dec. at ¶ 7. On his own accord and without the
15 knowledge or approval of Mr. Petrillo, Mr. von Storch then emailed this invitation to
16 approximately 20,000 individuals who were on a list, prepared by Mr. von Storch, of customers
17 and friends of VIDA and Bang. von Storch Dec. at ¶¶ 9, 10; Petrillo Dec. at ¶¶ 7-8. Mr. von
18 Storch states that he subsequently paid Vida \$3,000 as a "personal in-kind contribution" to the
19 OVF for the use and rental of the email list, calculated as "\$150[0].00 [sic] per 10,000 names."
20 von Storch Dec. at ¶ 10. The Commission's disclosure database indicates that Mr. von Storch
21 made a \$3,000 contribution to OVF on December 4, 2008.³

² Bang refers to Bang Salon and Spa, which is a salon owned by Mr. von Storch.

³ Although the contribution limit for individuals to a candidate committee during the 2008 election cycle was \$2,900, individuals could give a maximum contribution of \$28,500 to national party committees. See 2 U.S.C. § 441a(a). Because OVF was a joint fundraising committee in which OVF and the DNC were participants, an

1 On September 26, the day of the fundraiser, OVF brought in, at its own expense, the
2 equipment and volunteers to manage the event and guests, von Storch Dec. at ¶ 11, but it had not
3 received an invoice from VIDA for the use of the space and beverages. According to press
4 reports, more than 400 attended this event and tickets were "almost sold out" at \$250 to \$2,500.⁴
5 In addition, there were a limited number of tickets available at \$100. See VIDA Invitation.
6 Given that the gym was to open on the following Monday, von Storch reportedly promoted this
7 event a "meek peak" into the new location.⁵ At this time, we do not have information as to how
8 much was raised or how much of the amount raised resulted from Mr. von Storch's invitations.

9 After the event, Mr. Petrillo claims that he asked Mr. von Storch for an invoice but did
10 not receive one immediately. Petrillo Dec. at ¶ 9. According to Mr. von Storch, because the
11 main celebrity attraction cancelled her appearance at the last minute, "[f]rustration and confusion
12 reigned, and invoicing for the rental space and beverages got lost in the shuffle." von Storch
13 Dec. at ¶ 11. Furthermore, Mr. von Storch became occupied with the grand opening of the new
14 VIDA location and did not realize that he forgot to submit the invoice to Mr. Petrillo. von Storch
15 Dec. at ¶ 12. Mr. Petrillo also was deployed to Ohio to conduct campaign work and did not
16 realize that he had not yet received an invoice. Petrillo Dec. at ¶ 12. When Mr. Petrillo learned
17 of the Complaint in this matter, he again asked Mr. von Storch for the invoice. Petrillo Dec. at ¶
18 11.

individual could make a contribution up to \$30,000. See 11 C.F.R. § 102.17(c)(5) (providing that a contributor could make a contribution to the joint fundraising effort in an amount that represents the total of the allowable contribution limits for all participants).

⁴ Ann Schroeder Mullins, *Sarah Jessica Parker in Town Tonight for Obama*, POLITICO, Sept. 26, 2008, http://www.politico.com/blog/annschroeder/0926/Sarah_Jessica_in_town_tonight...

⁵ *Id.*; see also, Victor Maldonado, *Sarah Jessica Parker to Headline Obama Fundraiser in Washington*, Sept. 22, 2008, <http://www.southcoastland.com/showDiary.do?diaryId=7130&view=ring> (stating that the event would also celebrate the opening of VIDA's Metropole location).

1 On December 4, 2008, Mr. Petrillo received an invoice, dated November 26, 2008, from
2 Mr. von Storch for \$2,725.00. Petrillo Dec. at ¶ 12; VIDA invoice, attached as Exhibit C to
3 VIDA Response. Mr. von Storch stated that he charged \$2,500 for the space rental based upon
4 what he estimated a hotel would charge for the same amount of space used, given that the space
5 was new, and "there was no history of customary use, or usual and normal rental charge for, the
6 venue." VIDA Response at 4. In addition, Mr. von Storch charged \$225 for beverages that were
7 served at the event. von Storch Dec. at ¶ 12. OVF subsequently paid the invoice. See Check
8 No. 5560, attached as Exhibit D to VIDA Response.

9 **III. LEGAL ANALYSIS**

10
11 A corporation is prohibited from making a contribution in connection with a federal
12 election under the Act. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). In addition, neither a
13 federal candidate nor a political committee may knowingly accept a contribution from a
14 corporation. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d). The Commission's regulations
15 further provide that a corporation may not facilitate the making of a contribution by using its
16 corporate resources to engage in fundraising activities for any federal election. See 11 C.F.R.
17 § 114.2(f)(1). The regulations provide examples of conduct that constitute corporate facilitation,
18 including the use of a corporate customer list, to send invitations to individuals not within the
19 restricted class to fundraisers without advance payment; the use of meeting rooms that are not
20 customarily available to civic or community organizations; and the provision of catering or other
21 food services without advance payment. See 11 C.F.R. § 114.2(f)(2).

22 **A. Use of VIDA's Customer List**

23 Corporations such as VIDA, which do not have separate segregated funds, are permitted
24 to solicit contributions to be sent directly to candidates, but those solicitations are limited solely

1 to its restricted class, consisting of its stockholders and executive or administrative personnel,
2 and their families. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f). Moreover,
3 corporate facilitation may result if the corporation uses its list of customers, who are not within
4 the restricted class, to solicit contributions or distribute invitations to fundraisers without
5 advance payment for the fair market value of the list. See 11 C.F.R. § 114.2(f)(2)(i)(C).

6 Thus, when Mr. von Storch, the President of VIDA, emailed a list of 20,000 VIDA
7 customers and friends to distribute the September 26 fundraiser invitation without making an
8 advance payment, VIDA solicited outside of its restricted class and facilitated the making of
9 contributions to OVF. While Mr. von Storch reimbursed VIDA after the complaint was filed,
10 such reimbursement may mitigate but not vitiate a violation.

11 **B. Space Rental**

12 Corporate facilitation includes "using meeting rooms that are not customarily available to
13 clubs, civic or community organizations or other groups." 11 C.F.R. § 114.2(f)(2)(i)(D). For
14 example, facilitation would occur if a corporation makes its meeting room available for a
15 candidate's fundraiser, but not for community or civic groups. See *Explanation and*
16 *Justification, Facilitating the Making of Contributions*, 60 Fed. Reg. 64259, 64264 (Dec. 14,
17 1995). The permissibility of using such rooms when a corporation receives payment is governed
18 by 11 C.F.R. § 114.9(a), (b), or (d). *Id.* Section 114.9(d), which pertains to "use or rental" of
19 corporate facilities, provides that persons may make use of corporate facilities in connection with
20 a federal election so long as they reimburse the corporation "within a commercially reasonable
21 time in the amount of the normal and usual rental charge." *Id.*

22 In this matter, despite the purported agreement between Mr. von Storch and Mr. Petrillo,
23 VIDA failed to provide an invoice to the DNC until after the filing of the Complaint and 61 days

**MUR 6127 (Obama Victory Fund/Democratic National Committee)
Factual and Legal Analysis**

1 after the fundraising event. In a recent matter, MUR 5998 (John McCain for President), the
2 Commission determined that it was commercially reasonable for a vendor to invoice a committee
3 45 days after a campaign event and 6 days after the complaint had been filed, given that the
4 delay was relatively short and was due to a tax concern that was under review by the vendor.
5 Furthermore, the Commission has determined billing a committee approximately 90 days from
6 the event is commercially reasonable. See, e.g., MUR 6034 (Worth & Company, Inc.). While
7 the reason for the delay in this matter appears to have been an oversight by the parties, it appears
8 that VIDA obtained payment for the space within a commercially reasonable time, given that
9 VIDA billed OVF within 61 days of the event and received payment shortly thereafter.

10 ***c. Beverages***

11 Under 11 C.F.R. § 114.2(f)(2)(i)(E), corporate facilitation includes "providing catering or
12 other food services operated or obtained by the corporation or labor organization, unless the
13 corporation or labor organization receives advance payment for the fair market value of the
14 services." Because VIDA did not receive advance payment for the beverages, VIDA appears to
15 have facilitated the making of a contribution.

16 ***d. OVF***

17 In their Responses, the joint fundraising participants of OVF, the DNC and OFA largely
18 reiterate the facts and arguments presented in the VIDA Response. Both the DNC and OFA state
19 that Mr. von Storch acted on his own without consultation or knowledge from the DNC or OFA
20 when he mailed the OVF invitation to the VIDA customer list. See OFA Response at 3-4;
21 DNC/OVF Response at 2-3. We have no information suggesting otherwise. Thus, neither the
22 OVF nor DNC "knowingly" accepted a prohibited contribution in violation of 2 U.S.C. § 441b
23 through the use of the customer list.

1 Assuming that the valuation for the space is correct, OVF does not appear to have
2 accepted a prohibited contribution by renting VIDA's space because OVF paid for the space
3 within a commercially reasonable time. With respect to the beverages, OVF appears to have
4 accepted a prohibited contribution given that OVF failed to make an advance payment to VIDA
5 for these expenses in violation 11 C.F.R. § 114.2(f). However, the Commission exercises its
6 prosecutorial discretion and dismisses this allegation as to OVF and the DNC in light of the
7 relatively small amount of money involved and OVF's ultimate payment for the beverages. *See*
8 *Heckler v. Chaney*, 470 U.S. 821 (1985).

9 IV. CONCLUSION

10 Based upon the foregoing information, the Commission exercises its prosecutorial
11 discretion and dismisses the allegation that OVF and the DNC violated 2 U.S.C. § 441b(a). *See*
12 *Heckler v. Chaney*, 470 U.S. 821 (1985).

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Obama For America
Barack Obama**

MUR: 6127

L INTRODUCTION

The Complaint in this matter makes several allegations that Respondents violated provisions of the Federal Election Campaign Act, as amended ("Act"). First, the Complaint alleges that Obama for America and Martin H. Nesbitt, in his official capacity as Treasurer, ("OFA") converted campaign funds to President Barack Obama's personal use by paying his personal travel expenses during the 2008 presidential election in violation of 2 U.S.C. § 439a(b). Specifically, the Complaint claims that OFA and President Obama violated the Act's prohibition on personal use of campaign contributions when OFA used campaign contributions to pay for the President's trip to Hawaii to visit his sick grandmother on October 23 and 24, 2008.

Second, the Complaint alleges that VIDA Fitness ("VIDA"), a health club based in Washington, D.C., violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b), (d) and (f) by facilitating the making of contributions and making prohibited contributions to the Obama Victory Fund ("OVF"), a joint fundraising committee comprised of OFA and the Democratic National Committee ("DNC"). The Complaint claims that VIDA facilitated the making of contributions by using a corporate email list to distribute OVF fundraising solicitations and allowing OVF to use VIDA's facilities for a fundraiser. Because VIDA allegedly never charged OVF for the use of the email list or the use of the space, the Complaint argues that VIDA made, and OVF knowingly accepted, prohibited corporate contributions.

Third, the Complaint alleges that OFA failed to disclose a transfer of a donor list to Project Vote, an affiliate of the non-profit community organization, ACORN, in violation of 2

1 U.S.C. § 434(b) and 11 C.F.R. § 104.3. Fourth, the Complaint alleges that OFA intended to
2 accept, and Saul Ewing LLP intended to make, an excessive contribution in the form of pro bono
3 legal services provided by Saul Ewing lawyers to OFA in violation of 2 U.S.C. § 441a.

4 Based on the discussion below, the Commission: 1) dismisses the allegation that OFA
5 and President Obama violated 2 U.S.C. § 439a(b) by converting campaign funds for President
6 Obama's personal use; 2) dismisses the allegation that OFA violated 2 U.S.C. § 441b(a) by
7 knowingly accepting a prohibited contribution; 3) finds no reason to believe OFA violated 2
8 U.S.C. § 434(b) and 11 C.F.R. § 104.3 by failing to report an alleged transfer of a donor list; and
9 4) finds no reason to believe that OFA knowingly accepted an excessive contribution in violation
10 of 2 U.S.C. § 441a.

11 II. FACTUAL AND LEGAL ANALYSIS

12 A. Alleged Conversion of Campaign Funds to Personal Use

13 I. Facts

14 OFA was the principal campaign committee for President Barack Obama during the 2008
15 election for U.S. President. On or about October 21, 2008, President Obama's campaign
16 reportedly announced that the President would suspend his campaign to visit his ailing
17 grandmother in Hawaii.¹ According to the Response submitted by OFA, on October 23 and 24,
18 2008, President Obama traveled to Hawaii on his campaign plane, and "the purpose of the trip
19 was to visit his dying grandmother." OFA Response at 2. The Response, however, notes that
20 because the trip occurred two weeks before the general election, the President had no choice but
21 to travel on an aircraft "equipped with the space and capacity to address security and working
22 requirements." *Id.* In fact, the Secret Service required the President to use the campaign plane.
23

¹ See Scott Hellman, *Obama Suspends Campaign to Visit Ailing Grandmother in Hawaii*, THE BOSTON GLOBE, Oct. 21, 2008; Michael Powell, *Obama Briefly Leaving Trail to See Ill Grandmother*, THE NEW YORK TIMES, Oct. 21, 2008.

1 *Id.* In addition, the Response states that campaign aides traveled with the President to Hawaii,
2 and he participated in numerous campaign-related phone calls and meetings while in Hawaii.
3 The Response further notes that the "trip was reported on extensively by the national media." *Id.*

4 The Complaint estimates that OFA may have paid over \$100,000 to fly the President on
5 the campaign plane without obtaining reimbursement from the President. Complaint at 4 (*citing*
6 T.W. Farnam, *Campaigns Take Different Stances on Using Private Jets*, WALL ST. J., Oct 29,
7 2008). The Response does not indicate what the airfare to and from Hawaii actually cost, and we
8 have not been able to obtain any such information through publicly available sources.²

9 **2. Legal Analysis**

10 Under 2 U.S.C. § 439a(b)(1), a contribution cannot be converted to personal use by any
11 person. *Id.* Such conversion occurs "if the contribution or amount is used to fulfill any
12 commitment, obligation, or expense of a person that would exist irrespective of the candidate's
13 election campaign or individual's duties as a holder of Federal office." 2 U.S.C. § 439a(b)(2);
14 *see also* 11 C.F.R. § 113.1(g). In other words, "expenses that would be incurred even if the
15 candidate was not a candidate or officeholder are treated as personal rather than campaign or
16 officeholder related." *Final Rule and Explanation and Justification, Personal Use of Campaign*
17 *Funds*, 60 Fed. Reg. 7861, 7863 (Feb. 9, 1995) (hereinafter "1995 Personal Use E&J").³

² The article cited in the Complaint estimates that a flight to Hawaii on the Obama campaign charter plane, a Boeing 737, would likely cost about \$10,000 per flight hour, and assuming that the flight was 10 hours in duration, OFA probably paid at least \$100,000 for the trip. OFA reported a payment of \$180,101.25 to Executive Jet Management on October 31, 2008, on its 2008 Post-General Report. However, we do not know if this disbursement covered the President's trip to Hawaii. Even if this disbursement did include the trip, the disbursement likely included other air travel besides the flight to and from Hawaii.

³ In the Bipartisan Campaign Reform Act of 2002, Congress codified the "irrespective" test for personal use set forth in 11 C.F.R. § 113.1(g)(1) by amending the pre-BCRA version of 2 U.S.C. § 439a(b). *See Final Rule and Explanation and Justification, Personal Use of Campaign Funds*, 67 Fed. Reg. 76962, 76970 (Dec. 13, 2002). The Commission announced that it would therefore not revise the "irrespective" test. *Id.*

1 The Response claims that OFA's use of campaign funds to pay for the trip was not a
2 violation of section 439a because the expenses for the Hawaii trip "would not have been incurred
3 irrespective of President-Elect Obama's candidacy." Response at 2. While the Response states
4 that the purpose of the trip was to visit his dying grandmother, it maintains that security concerns
5 and working requirements rendered it "impossible" for the President not to fly on the campaign
6 plane. *Id.* Furthermore, the Response argues that during the trip, the President engaged in
7 campaign activities that were more than incidental, and thus the expense of this travel should be
8 considered a campaign expense under 11 C.F.R. § 106.3(b)(3), which requires that a candidate
9 report travel expenditures where the candidate conducts any non-incidental, campaign-related
10 activity in a travel stop.

11 In cases where travel involves both personal and campaign-related activities, 11 C.F.R.
12 § 113.1(g)(1)(ii)(C) provides that "the incremental expenses that result from personal activities
13 are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account
14 within thirty days for the amount of the incremental expenses." *Id.*; see also 11 C.F.R.
15 § 113.1(g)(1)(ii)(D) (requiring candidate to reimburse campaign account within 30 days where
16 vehicle is used for both personal and campaign-related activities, unless personal activities are a
17 *de minimis* amount); 1995 Personal Use E&J at 7869 (stating if committee uses campaign funds
18 to pay for mixed travel expenses, the candidate or officeholder is required to reimburse
19 committee for incremental expenses that resulted from personal activities); MUR 5218 (Russ
20 Francis), First General Counsel's Report at 7-8 (stating that candidate should have reimbursed
21 committee where some travel expenses paid by committee appeared to be for personal use).
22 While the Commission has required candidates or office holders to reimburse incremental travel
23 expenses that are personal, (i.e., additional expenses attributable to personal use in a mixed travel

1 context), the Commission historically has considered airfare as a defined expense that is not
2 apportioned as both a personal and campaign expense and thus applied the irrespective test to
3 determine whether personal or campaign funds should be used to pay for the airfare. See AO
4 2002-05 (Hutchinson) (citing 1995 Personal Use E&J at 7869).

5 The Response relies on 11 C.F.R. § 106.3(b)(3)—which provides that where campaign-
6 related activity is more than incidental in a stop, that entire stop will be treated as a campaign-
7 related stop—in support of its assertion that OFA's use of campaign funds for the trip to Hawaii
8 was permissible. Section 106.3(b)(3) predates BCRA's statutory prohibition against personal
9 use in 2 U.S.C. § 439a(b) and the definition of personal use in 11 C.F.R. § 113.1(g), which apply
10 the "irrespective test" to prohibit campaign funds from being used for non-campaign-related
11 activity. Thus, section 106.3 must be read in conjunction with 2 U.S.C. § 439a(b), and the
12 Commission must apply the statutory provision to analyze whether the expense would have
13 occurred irrespective of a candidate's campaign or duties as a Federal officeholder.⁴

14 This approach is consistent with the Commission's approach in AO 2002-05
15 (Hutchinson). In this opinion, the Commission considered the interplay of the personal use
16 provisions and section 106.3 where a City Mayor traveled to Washington, D.C. to conduct city
17 business but also conducted some federal campaign activity and took some time for personal
18 travel. Because the Mayor spent two out of eight days on federal campaign activity, the
19 Commission concluded that the federal activity was more than incidental. Rather than treating
20 the whole trip as a campaign-related expense under section 106.3(b), however, the Commission
21 stated that the Mayor must apply the incremental approach under section 113.1(g) and ensure
22 that her federal committee did not pay for the non-campaign related portion of the trip. In this

⁴ In AO 2002-05, the Commission specifically declared that past advisory opinions, including AO 1992-34 and 1994-37, which applied section 106.3(b)(3) and were inconsistent with the approach in section 113.1(g)(1)(D)(C), were superseded. See AO 2002-05 at fn. 7.

1 matter, applying section 106.3(b)(3) to transform a trip, which was for the purpose of meeting a
2 personal obligation, into a campaign-related trip would be inconsistent with section 439a(b)'s
3 prohibition against personal use established by Congress. While the prohibition on personal use
4 recognizes that candidates have wide discretion over the use of campaign funds, candidates must
5 reasonably show that the expenses at issue resulted from campaign activities. See 1995 Personal
6 Use E&J at 7867. OFA does not state whether President Obama was scheduled to appear for any
7 events that were specifically scheduled in Hawaii, nor does it contend that the campaign activity,
8 which included conducting some meetings and making phone calls, was required to be conducted
9 in Hawaii or was otherwise related to his trip to Hawaii.

10 Although OFA states that the President engaged in "more than incidental" campaign
11 activity while he was in Hawaii, it does not alter the fact that the travel to Hawaii was for a non-
12 campaign purpose.⁵ Accordingly, based upon the submissions, it appears that the travel to
13 Hawaii would have occurred irrespective of the campaign and that President Obama should have
14 reimbursed his campaign for airfare for the trip to Hawaii under section 439a(b). The security
15 and working needs that required the use of the campaign plane, however, would not have existed
16 irrespective of his campaign and therefore the increased costs associated with traveling on the
17 campaign plane are not personal use. Thus, reimbursement for the approximate commercial first
18 class rate, rather than the charter rate, would be more appropriate given that the Secret Service
19 required the President to use the campaign plane for security reasons.⁶ When obtaining pricing
20 information for a hypothetical flight from Indianapolis, Indiana to Honolulu, Hawaii, we found

⁵ The Commission has not previously addressed whether meetings and phone calls are sufficient to be considered more than "incidental" and does not reach that question here.

⁶ In the Honest Leadership and Open Government Act of 2007 ("HLOGA"), Congress amended 2 U.S.C. § 439a to require that federal candidates pay the fair market value of a flight based upon "the normal and usual charter fare or rental charge for a comparable plane . . ." when making an expenditure for a flight on an aircraft. See 2 U.S.C. § 439a(e)(1). Because it appears that President Obama's use of the campaign plane constituted personal use and not an expenditure, reimbursement based on a charter rate would not apply in this case.

1 prices ranging from \$1,248-\$1,338.⁷ Accordingly, it appears that President Obama should have
2 reimbursed the campaign with funds in this range in order to comply with section 439a(b).

3 Given the small amount at issue, however, we do not believe that it would be a prudent
4 use of the Commission's limited resources to pursue this matter further. Furthermore, this case
5 appears to present unique circumstances, as President Obama was the first Presidential candidate
6 to forego public financing in the general election, and most federal candidates are not required to
7 travel with the Secret Service and a large press corps and to use a private charter equipped to
8 address certain work and security requirements. Based upon the small amount in violation and
9 the relatively novel facts and issues presented in this matter, the Commission exercises its
10 prosecutorial discretion and dismisses the allegation that OFA and President Obama violated 2
11 U.S.C. § 439a(b). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

12 **B. Alleged Facilitation and Making of Prohibited Contributions**

13 **1. Facts**

14 VIDA, a Subchapter S corporation, is a fitness club with three locations in Washington,
15 D.C.⁸ Response of VIDA Fitness ("VIDA Response"), Declaration of David von Storch ("von
16 Storch Dec.") at ¶ 1. David von Storch is VIDA's sole shareholder and has been an active
17 member of the Democratic Party. von Storch Dec. at ¶¶ 1-2. According to the VIDA Response,
18 in mid-September 2008, Mr. von Storch and Tom Petrillo, a fundraiser for the DNC, spoke about
19 holding a fundraising event on September 26, 2008 to benefit OVF. *Id.* at ¶ 3. Mr. von Storch

⁷ According to press reports, President Obama was leaving for Honolulu after a campaign event in Indianapolis on Thursday, October 24, 2008. *See Holmes, supra* note 1. Thus, based on this information, we used a common on-line travel website to determine what a hypothetical first class, commercial rate would be from Indianapolis to Honolulu on a Thursday within the same week. *See Travelocity Search Results*. We only researched a one way ticket because the flight departing Honolulu to where President Obama would resume his campaigning would be considered a campaign stop and campaign funds would be used for that particular trip. *See* 1995 Personal Use Ed.) at 7869.

⁸ *See* VIDA Fitness website, www.vidafitness.com.

1 told Mr. Petrillo about empty space at VIDA's newest location, and they agreed to hold the event
2 at this location. *Id.* The VIDA Response and the Response of DNC and OVF ("DNC/OVF
3 Response") indicate that Mr. Petrillo informed Mr. von Storch that OVF would have to be
4 invoiced for the rental of the space as well as any food or beverages served at the event. *Id.*;
5 DNC/OVF Response, Declaration of Thomas Petrillo ("Petrillo Dec.") at ¶ 4.

6 Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the
7 fundraiser. *See* OVF Invitation, attached as Exhibit A to DNC/OVF Response; von Storch Dec.
8 at ¶ 7. Mr. Petrillo also emailed this invitation to approximately 500 donors in the D.C.
9 metropolitan area. Petrillo Dec. at ¶ 5. According to Mr. von Storch, he revised the invitation,
10 without Mr. Petrillo's knowledge or approval, adding a special disclaimer stating, "VIDA and
11 Bang⁹ do not endorse nor support any political candidate, but do encourage their members and
12 friends to get involved and participate in the electoral process." *See* VIDA Invitation, attached
13 as Exhibit B of VIDA Response; von Storch Dec. at ¶ 7. On his own accord and without the
14 knowledge or approval of Mr. Petrillo, Mr. von Storch then emailed this invitation to
15 approximately 20,000 individuals who were on a list, prepared by Mr. von Storch, of customers
16 and friends of VIDA and Bang. von Storch Dec. at ¶¶ 9, 10; Petrillo Dec. at ¶¶ 7-8. Mr. von
17 Storch states that he subsequently paid Vida \$3,000 as a "personal in-kind contribution" to the
18 OVF for the use and rental of the email list, calculated as "\$150[0].00 [sic] per 10,000 names."
19 von Storch Dec. at ¶ 10. The Commission's disclosure database indicates that Mr. von Storch
20 made a \$3,000 contribution to OVF on December 4, 2008.¹⁰

⁹ Bang refers to Bang Salon and Spa, which is a salon owned by Mr. von Storch.

¹⁰ Although the contribution limit for individuals to a candidate committee during the 2008 election cycle was \$2,300, individuals could give a maximum contribution of \$28,500 to national party committees. *See* 2 U.S.C. § 441a(a). Because OVF was a joint fundraising committee in which OVF and the DNC were participants, an individual could make a contribution up to \$30,800. *See* 11 C.F.R. § 102.17(e)(5) (providing that a contributor

10044261452

1 On September 26, the day of the fundraiser, OVF brought in, at its own expense, the
2 equipment and volunteers to manage the event and guests, von Storch Dec. at ¶ 11, but it had not
3 received an invoice from VIDA for the use of the space and beverages. According to press
4 reports, more than 400 attended this event and tickets were "almost sold out" at \$250 to \$2,500.¹¹
5 In addition, there were a limited number of tickets available at \$100. See VIDA Invitation.
6 Given that the gym was to open on the following Monday, von Storch reportedly promoted this
7 event a "sneak peak" into the new location.¹² At this time, we do not have information as to how
8 much was raised or how much of the amount raised resulted from Mr. von Storch's invitations.

9 After the event, Mr. Petrillo claims that he asked Mr. von Storch for an invoice but did
10 not receive one immediately. Petrillo Dec. at ¶ 9. According to Mr. von Storch, because the
11 main celebrity attraction cancelled her appearance at the last minute, "[f]rustration and confusion
12 reigned, and invoicing for the rental space and beverages got lost in the shuffle." von Storch
13 Dec. at ¶ 11. Furthermore, Mr. von Storch became occupied with the grand opening of the new
14 VIDA location and did not realize that he forgot to submit the invoice to Mr. Petrillo. von Storch
15 Dec. at ¶ 12. Mr. Petrillo also was deployed to Ohio to conduct campaign work and did not
16 realize that he had not yet received an invoice. Petrillo Dec. at ¶ 12. When Mr. Petrillo learned
17 of the Complaint in this matter, he again asked Mr. von Storch for the invoice. Petrillo Dec. at ¶
18 11.

could make a contribution to the joint fundraising effort in an amount that represents the total of the allowable
contribution limits for all participants).

¹¹ Ann Schroeder Mullins, *Sarah Jessica Parker in Town Tonight for Obama*, POLITICO, Sept. 26, 2008,
http://www.politico.com/blog/annschroeder/0908/Sarah_Jessica_in_town_tonight...

¹² *Id.*; see also, Victor Maldonado, *Sarah Jessica Parker to Headline Obama Fundraiser in Washington*, Sept. 22,
2008, <http://www.washingtonland.com/showDiary.do?diaryId=7130&view=print> (stating that the event would also
celebrate the opening of VIDA's Metropole location).

On December 4, 2008, Mr. Petrillo received an invoice, dated November 26, 2008, from Mr. von Storch for \$2,725.00. Petrillo Dec. at ¶ 12; VIDA invoice, attached as Exhibit C to VIDA Response. Mr. von Storch stated that he charged \$2,500 for the space rental based upon what he estimated a hotel would charge for the same amount of space used, given that the space was new, and "there was no history of customary use, or usual and normal rental charge for, the venue." VIDA Response at 4. In addition, Mr. von Storch charged \$225 for beverages that were served at the event. von Storch Dec. at ¶ 12. OVF subsequently paid the invoice. See Check No. 5560, attached as Exhibit D to VIDA Response.

2. Legal Analysis

A corporation is prohibited from making a contribution in connection with a federal election under the Act. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). In addition, neither a federal candidate nor a political committee may knowingly accept a contribution from a corporation. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d). The Commission's regulations further provide that a corporation may not facilitate the making of a contribution by using its corporate resources to engage in fundraising activities for any federal election. See 11 C.F.R. § 114.2(f)(1). The regulations provide examples of conduct that constitute corporate facilitation, including the use of a corporate customer list, to send invitations to individuals not within the restricted class to fundraisers without advance payment; the use of meeting rooms that are not customarily available to civic or community organizations; and the provision of catering or other food services without advance payment. See 11 C.F.R. § 114.2(f)(2).

a. *Use of VIDA's Customer List*

Corporations such as VIDA, which do not have separate segregated funds, are permitted to solicit contributions to be sent directly to candidates, but those solicitations are limited solely

1 to its restricted class, consisting of its stockholders and executive or administrative personnel,
2 and their families. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f). Moreover,
3 corporate facilitation may result if the corporation uses its list of customers, who are not within
4 the restricted class, to solicit contributions or distribute invitations to fundraisers without
5 advance payment for the fair market value of the list. See 11 C.F.R. § 114.2(f)(2)(i)(C).

6 Thus, when Mr. von Storch, the President of VIDA, emailed a list of 20,000 VIDA
7 customers and friends to distribute the September 26 fundraiser invitation without making an
8 advance payment, VIDA solicited outside of its restricted class and facilitated the making of
9 contributions to OVF. While Mr. von Storch reimbursed VIDA after the complaint was filed,
10 such reimbursement may mitigate but not vitiate a violation.

11 *b. Space Rental*

12 Corporate facilitation includes "using meeting rooms that are not customarily available to
13 clubs, civic or community organizations or other groups." 11 C.F.R. § 114.2(f)(2)(i)(D). For
14 example, facilitation would occur if a corporation makes its meeting room available for a
15 candidate's fundraiser, but not for community or civic groups. See *Explanation and*
16 *Justification, Facilitating the Making of Contributions*, 60 Fed. Reg. 64259, 64264 (Dec. 14,
17 1995). The permissibility of using such rooms when a corporation receives payment is governed
18 by 11 C.F.R. § 114.9(a), (b), or (d). *Id.* Section 114.9(d), which pertains to "use or rental" of
19 corporate facilities, provides that persons may make use of corporate facilities in connection with
20 a federal election so long as they reimburse the corporation "within a commercially reasonable
21 time in the amount of the normal and usual rental charge." *Id.*

22 In this matter, despite the purported agreement between Mr. von Storch and Mr. Petrillo,
23 VIDA failed to provide an invoice to the DNC until after the filing of the Complaint and 61 days

1 after the fundraising event. In a recent matter, MUR 5998 (John McCain for President), the
2 Commission determined that it was commercially reasonable for a vendor to invoice a committee
3 45 days after a campaign event and 6 days after the complaint had been filed, given that the
4 delay was relatively short and was due to a tax concern that was under review by the vendor.
5 Furthermore, the Commission has determined billing a committee approximately 90 days from
6 the event is commercially reasonable. *See, e.g.*, MUR 6034 (Worth & Company, Inc.). While
7 the reason for the delay in this matter appears to have been an oversight by the parties, it appears
8 that VIDA obtained payment for the space within a commercially reasonable time, given that
9 VIDA billed OVF within 61 days of the event and received payment shortly thereafter.

10 *c. Beverages*

11 Under 11 C.F.R. § 114.2(f)(2)(i)(B), corporate facilitation includes "providing catering or
12 other food services operated or obtained by the corporation or labor organization, unless the
13 corporation or labor organization receives advance payment for the fair market value of the
14 services." Because VIDA did not receive advance payment for the beverages, VIDA appears to
15 have facilitated the making of a contribution.

16 *d. OVF*

17 In their Responses, the joint fundraising participants of OVF, the DNC and OFA largely
18 reiterate the facts and arguments presented in the VIDA Response. Both the DNC and OFA state
19 that Mr. von Storch acted on his own without consultation or knowledge from the DNC or OFA
20 when he mailed the OVF invitation to the VIDA customer list. *See* OFA Response at 3-4;
21 DNC/OVF Response at 2-3. We have no information suggesting otherwise. Thus, neither the
22 OVF nor OFA "knowingly" accepted a prohibited contribution in violation of 2 U.S.C. § 441b
23 through the use of the customer list.

1 Assuming that the valuation for the space is correct, OVF does not appear to have
2 accepted a prohibited contribution by renting VIDA's space because OVF paid for the space
3 within a commercially reasonable time. With respect to the beverages, OVF appears to have
4 accepted a prohibited contribution given that OVF failed to make an advance payment to VIDA
5 for these expenses in violation 11 C.F.R. § 114.2(f). However, the Commission exercises its
6 prosecutorial discretion and dismisses this allegation as to OFA in light of the relatively small
7 amount of money involved and OVF's ultimate payment for the beverages. *See Heckler v.*
8 *Cheney*, 470 U.S. 821 (1985).

9 **C. Alleged Failure to Disclose Transfer of Donor List**

10 **1. Facts**

11 The Association of Community Organizations for Reform Now or "ACORN" describes
12 itself as a "non-profit, non-partisan social justice organization."¹³ Project Vote describes itself as
13 a "national nonpartisan, nonprofit 501(c)(3)" organization and has partnered with ACORN, to
14 conduct voter registration drives.¹⁴ According to the complaint and publicly available
15 information, an ACORN whistleblower reportedly testified in a Pennsylvania court case that
16 OFA provided its donor lists to the Development Director of Project Vote.¹⁵

17 **2. Legal Analysis**

18 2 U.S.C. § 434(b)(4) requires a political committee to disclose its disbursements, and
19 11 C.F.R. § 104.3(b)(4)(vi) requires that an authorized committee must itemize a disbursement
20 of which the aggregate amount or value exceeds \$200. The Complaint alleges that OFA violated

¹³ See ACORN Website, <http://www.acorn.org/index.php?id=12342>.

¹⁴ See Project Vote Website, <http://www.projectvote.org/our-mission.html>.

¹⁵ See Complaint at 2 (citing *Meyer v. Corbin*, Commonwealth Court of Pennsylvania (Civ. No. 497 MD 2008) (filed Oct. 17, 2008); John Fund, *An ACORN Whistleblower Testifies in Court*, WALL ST. J., Oct. 30, 2008 (describing testimony of former employee of ACORN stating that a Project Vote development director told her that Project Vote had obtained donor lists from the Obama campaign).

10044261457

1 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3 by failing to disclose the transfer of its donor list to
2 Project Vote. *See* Complaint at 2. The Complaint claims that according to past advisory
3 opinions, the Commission has determined that donor or mailing lists have value, and therefore
4 OFA should have disclosed the transfer of the donor lists as a disbursement pursuant to § 434(b).
5 *See, e.g.*, AO 2002-14 (Libertarian National Committee) (rental payments from leased mailing
6 lists are reportable).¹⁶

7 OFA's Response states that it "never gave its donor lists to Project Vote, ACORN, or any
8 other organization." OFA Response at 1. The Response notes that while its Privacy Policy may
9 permit it to transfer its donor lists to other organizations for a fee pursuant to a rental agreement,
10 OFA never gave or rented its list to Project Vote. In addition, the Response attaches the
11 Declaration of Michael Dykes, the former Finance Chief of Staff for OFA. The Declaration
12 states that OFA "never gave its donor lists to Project Vote, ACORN, or any other organization"
13 and "whenever [OFA] did transfer its donor lists to other organizations, it did so for a fee
14 pursuant to a rental agreement and reported the transactions accordingly." Declaration of
15 Michael Dykes, Exhibit A of OFA Response. Because the Committee did not transfer the lists to
16 Project Vote, the Response claims that there was no transaction to disclose and no violation of
17 the FECA. OFA Response at 2.

18 Recently, this allegation has received increased media attention amid claims that the *New*
19 *York Times* refused to cover a story that the Obama campaign had given ACORN a list of "so-
20 called mixed-out donors."¹⁷ While a former ACORN employee gave a *New York Times* reporter
21 a donor list, the reporter was unable to verify that the list came from the Obama campaign and

¹⁶ MUR 5396 (Boner for President 2000), Consultation Agreement (determining that donor list had value and finding that respondent received an excessive in-kind contribution in the form of a donor list at less than the usual and normal charge).

¹⁷ Clark Hoyt, *The Tip That Didn't Pan Out*, THE NEW YORK TIMES, May 17, 2009.

1 ultimately did not pursue the story.¹⁸ However, this former ACORN employee, who may be the
2 ACORN whistleblower referenced in the Complaint, has subsequently made public statements
3 that the Obama campaign gave a donor list to ACORN.¹⁹

4 Although there appears to be some speculation in the press that the Obama campaign
5 gave a donor list to ACORN, the Response has flatly denied that OFA gave any donor list for
6 free to any outside organization, including ACORN, and no specific information has been
7 presented to the contrary. Given that the Response appears to adequately rebut the allegations,
8 the Commission finds no reason to believe that OFA violated 2 U.S.C. § 434(b) and 11 C.F.R.
9 § 104.3.

10 **D. Alleged Excessive Contributions**

11 **1. Facts**

12 Saul Ewing, LLP, ("Saul Ewing") is a law firm organized as a Delaware limited liability
13 partnership.²⁰ It has offices throughout the Mid-Atlantic region of the United States. On
14 October 28, 2008, an article published in the *New York Times* reported that thousands of lawyers
15 were assisting President Barack Obama's campaign by monitoring the polls on Election Day.²¹
16 The article described how Saul Ewing allowed attorneys employed by the firm to receive pro
17 bono credit for voter protection work and quoted a Saul Ewing partner, Orian Johnson, who
18 stated, "Our lawyers are willing to go mano-a-mano."²² The article then identified Mr. Johnson
19 as "a member of the Obama national finance committee," and in the immediately following

¹⁸ *Id.*

¹⁹ See O'Reilly Nails New York Times Over Obama-ACORN Lie, May 19, 2009, available at
<http://www.foxnews.com/story/0,2933,520701,00.html>.

²⁰ See Saul Ewing Website, http://www.saul.com/about_us/aboutus.aspx.

²¹ See Leslie Wayne, *Party Lawyers Ready to Keep an Eye on the Polls*, NEW YORK TIMES, Oct. 28, 2008.

²² *Id.*

1 sentence, stated, "All volunteers must undergo a training session either in person or online with
2 the Obama campaign."²³

3 2. Legal Analysis

4 During the 2008 general election, no person could make a contribution, which exceeded
5 \$2,300, to any federal candidate and his authorized committee. 2 U.S.C. § 441(a)(1)(A); 11
6 C.F.R. § 110.1(b). 2 U.S.C. § 431(11) defines "person" to include a partnership. *Id.* Under
7 Commission regulations, a contribution by a partnership must be attributed to the partnership and
8 to each partner either in direct proportion to his or her share of the partnership profits or by
9 agreement of the partners. 11 C.F.R. § 110.1(e)(1), (2). Because Saul Ewing is a partnership, it
10 was subject to the Act's contribution limits.

11 Citing the October 28, 2008 *New York Times* article, the Complaint alleges that OFA
12 intended to knowingly accept, and Saul Ewing, LLP intended to make, excessive contributions
13 through pro bono legal services rendered by Saul Ewing to OFA in violation of 2 U.S.C. § 441a.
14 Barring some exceptions, the provision of free legal services to a political committee becomes a
15 contribution under 2 U.S.C. § 431(8)(A)(ii), which states that a contribution includes, "the
16 payment by any person of compensation for the personal services of another person which are
17 rendered to a political committee without charge for any purpose." *Id.*; see also 11 C.F.R.
18 § 100.54; AO 2006-22 (Jenkins & Gilchrist) (law firm's preparation of amicus brief on behalf of
19 political committee free of charge would constitute a contribution). Thus, if Saul Ewing did
20 provide pro bono legal services to OFA, it would have made a contribution to OFA.

21 OFA and Saul Ewing both contend, however, that Saul Ewing never provided pro bono
22 services to OFA. See OFA Response at 2-3; Saul Ewing Response at 2. OFA states that it has
23 no knowledge of Saul Ewing providing any pro bono legal services to OFA. OFA Response at

²³ *Id.*

1 2-3. In addition, Saul Ewing indicates that the article did not accurately report the voter
2 protection activities of its lawyers. *Id.* Although some of its attorneys participated in such
3 activities for pro bono credit, the attorneys participated in a nonpartisan voter protection effort
4 led by the Lawyers' Committee for Civil Rights Under Law, not the Obama campaign. Saul
5 Ewing Response at 2. According to Saul Ewing, while the *New York Times* reporter did speak
6 with Mr. Johnson, Mr. Johnson believed that her questions concerned his personal role in the
7 Obama campaign and not the law firm. *See id.* at 2.

8 Given the specific information provided by OFA and Saul Ewing, we believe that the
9 Responses adequately rebut the allegations contained in the Complaint. Accordingly, the
10 Commission finds no reason to believe that OFA knowingly accepted excessive in-kind
11 contributions in violation of 2 U.S.C. § 441a(f).

12 **III. CONCLUSION**

13 In conclusion, the Commission takes the following actions: 1) dismisses the allegation
14 that OFA and President Barack Obama violated 2 U.S.C. § 439a(b); 2) dismisses the allegation
15 that OFA violated 2 U.S.C. § 441b(a); 4) finds no reason to believe OFA violated 2 U.S.C.
16 § 434(b) and 11 C.F.R. § 104.3; and 5) finds no reason to believe that OFA violated of 2 U.S.C.
17 § 441a.